No. 15138

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR THOMAS LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

APPELLANT'S BRIEF

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Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Cultured Mushroom Industries, Inc., a corporation, and Arthur Thomas Lelles, an individual, were charged in two counts of an indictment with violation of the Federal Food, Drug and Cosmetic Act, charging them both with unlawfully causing to be introduced and delivered for introduction into inter-state commerce at Seattle, Washington, in count one, a delivery to Leon, State of Iowa, consigned to Charles L. Imhoff, a number of cartons containing food. They then allege

that the food was adultered within the meaning of 21 U.S.C. 342 (a) (3), in that it consisted in part of a filthy substance by reason of the presence in said food of insect larvae and insect fragments. The indictment then alleges in count One that on August 7, 1950, the said Cultured Mushroom Industries, Inc. and Arthur Thomas Lelles, were convicted in this court of the violation of the Federal Food, Drug and Cosmetic Act and that said conviction had become final before the violation alleged was committed.

Count Two charges both the Cultured Mushroom Industries, Inc., a corporation, and Arthur Thomas Lelles with the same violation consisting of a shipment to Eau Claire, State of Wisconsin, consigned to Ted R. Fitzl a number of cartons containing food which it is alleged were adulterated. The second count likewise repeats that on August 7, 1950, the Cultured Mushroom Industries, Inc. and Arthur Thomas Lelles were both convicted of violation of the Federal Food, Drug and Cosmetic Act, which conviction had become final before the violation hereinbefore alleged was committed.

The verdict of the jury was that both the Cultured Mushroom Industries, Inc. and Arthur T. Lelles were guilty of Count One and Count Two of the indictment.

At the conclusion of the Government's case the de-

fendants each for themselves moved the court for an order of dismissal, challenged the legal sufficiency of the evidence, and asked the court to direct a verdict of "not guilty." The same motion was made at the conclusion of the defendants' case. The Court in each instance denied the motions.

A motion for a new trial was made (Tr. 8); the Court denied the motion for a new trial but (Tr. 9) the Court granted judgment of acquittal as to the defendant, Cultured Mushroom Industries, Inc. but denied the motion of the defendant, Arthur T. Lelles as an individual for a new trial. The defendant was then found guilty by the Court and sentenced to 18 months on Count One of the indictment and 18 months on Count Two of the indictment. The execution of the sentence imposed on Count Two to be concurrent with and not consecutive to the execution of the sentence imposed on Count One. A fine likewise of $1,000.00 on each count was imposed (Tr. 11).

The defendant gave notice of appeal (Tr. 12) and the matter is now before this Court.

STATEMENT OF POINTS TO BE RELIED UPON IN APPEAL

The defendant urges the following points in appeal of the decision of the lower Court.

1: The motion to dismiss the indictment should have been sustained on the ground of variance between allegation in said indictment and the proof.

2: The Court erred in allowing the Government to call the witness Shallit on rebuttal and testify to taking of samples and then allowed, over objection of defendant's attorney, witness Elliott on rebuttal to testify to an analysis of certain samples taken by Shallit. That the testimony of these two witnesses offered for the first time on rebuttal was error. It was also improper on rebuttal to call witness Wallace who testified on rebuttal over objections duly taken by defendant.

3: It was error on the part of the Court to allow the witness Wallace to testify on rebuttal that the exhibits being marked with Codes No. 102 and No. 103 were not the same products that were examined by the Food and Drug Department in 1950 and approved. That said objection is based upon the fact that the answer to that question was for the jury to decide and was improper on rebuttal.

4: That it was error for the Court to submit to the jury the question of liability of the Cultured Mushroom Industries, Inc., and the question of the liability of Mr. Arthur Thomas Lelles as an individual on the grounds that there was not sufficient evidence presented to allow the matter to go to the jury. That even though the

Court later sustained a motion to dismiss as to the Cultured Mushroom Industries, Inc., it was error to submit the case as to the corporation and individual to the jury.

5: The Court should have sustained the challenge of the defendant to the legal sufficiency of the evidence and directed a verdict of Not Guilty.

6: There was a misjoinder of parties defendant.

ARGUMENT ON STATEMENT OF POINTS 4, 5 AND 6

It is respectfully urged that there was not sufficient evidence as to the defendant, Arthur Thomas Lelles, to allow this matter to go to the jury. The court should have entered an order of dismissal at the conclusion of the Government's case and at the conclusion of the defendants' case; and that, even though the Court later sustained a motion to dismiss as to the Cultured Mushroom Industries, Inc., it was error to submit the case as to the corporation and as to the individual to the jury.

On the question of the insufficiency of the evidence we wish to call to the Court's attention the testimony of Mr. Wallace, a Government witness. He testified that he examined certain cans which were turned over to him as having been shipped by the defendant (Tr.

26). He said it contained filthy matter (Tr. 24 and 25). These cans were not introduced in evidence. He then identified the defendants' exhibit A-1, which was a copy of a report made by this very witness dated April 20, 1950, concerning lots 102 and lots 103 (Tr. 27). Then the Government stipulated (Tr. 27) that Mr. Wallace, their witness, a Government chemist, analyzed samples of Cultured Mushroom salt taken from Mr. Lelles' premises in 1950, being lots 102 and lots 103, and found them free of filth or beetle or larvae fragments.

It must be noted that this witness did not examine any of the contents of any of the cans introduced into evidence as plaintiff's 1 and 3 to determine whether they were filthy (Tr. 28). His testimony was with reference to an analysis of other cans than those that were introduced in evidence. His very words were "I analyzed Cultured Mushroom salt which was in different cans than those which are here" (Tr. 26). The Court's attention is called to the fact that all this mushroom salt was marked with code numbers and the same witness, on direct testimony, testified that in 1950 he examined these codes and found them to be O.K. The Government gave the defendants the right and permission to sell this mushroom salt after examination and then later arrested him for doing it. Witnesses were then called by the Government to establish the fact that

the cans now in evidence were taken from the various purchasers and that they had received them in interstate shipment with which we had no quarrel.

The Government witness, Baukin, on direct examination testified to a visit at the plant at 2954 Admiral Way wherein he made an inspection of the premises (Tr. 39). He testified that he was advised by the secretary, not Mr. Lelles, that the shipments upon which this indictment were based were made on that information this indictment was founded. He further testified on page 47 that the information with reference to the shipments which were made were given to him voluntarily.

After the corporate records were introduced the plaintiff rested its case. The challenges and motions were properly made for dismissal of the action. Obviously as to the defendant, Cultured Mushroom Industries, Inc., the action should have been dismissed at once, because the record showed that the shipment was made in the name of another corporation, the Washington Mushroom Industries; that the payment was made to the Washington Mushroom Industries, Inc, and the Cultured Mushroom Industries, Inc. did not have anything to do with the matter of this shipment. The Court, however, saw fit to let the matter go to the jury at that point.

The Government's position was, and it had to be sus-

tained because the indictment alleged that the Cultured Mushroom Industries, Inc. and Mr. Lelles made a shipment, that Mr. Lelles was the head of the Cultured Mushroom Industries, Inc. and therefore was responsible as well as being an officer and head of the company, and that the corporation was responsible. Now, it should follow that if the corporation was found Not Guilty, or rather dismissed by the Court, then the officer performing a function for said corporation should likewise be found Not Guilty, and that the matter should not be submitted to the jury when the officer or general manager of the corporation, as charged in the indictment, is not guilty. If the indictment had alleged that a shipment was made, as it was made, by the Washington Mushroom Industries, Inc., and if they were the ones that collected the money, that made the shipment and violated the law, and that Mr. Lelles, an officer of the company, made or directed it to be made, and then if the jury found both the corporation and Mr. Lelles guilty, there would be no quarrel with the decision. But in this case Mr. Lelles was charged as an individual and as an officer of the corporation and the corporation was charged. The Court decreed that the corporation was not responsible, therefore it should follow that the officer of the corporation is not responsible because he is not charged as an officer of the Washington Mushroom Industries, Inc., the concern that actually made the shipment.

At this point in the evidence, there has been no testimony which shows that the exhibits introduced here in evidence were filthy substances or that they contained filthy and putrid matter and in violation of the law. The evidence at this point only shows that samples taken from a shipment not introduced in evidence but other samples, not the ones marked for exhibit and offered in evidence, contained matter in violation of the law. The record likewise discloses at this point that said exhibits were part of a stock of merchandise which had been previously approved by the Government's own witness.

On the matter of variance and sufficiency of the proof to submit the matter to the jury, this Court's attention is called to the allegation in the indictment which charges both defendants with having shipped on or about February 10, 1955, (Tr. 3). The Court's attention is likewise called to the fact that (Tr. 39) the inspector, Baukin came to the plant on February 7th or February 8th, 1955, 3 or 4 days before the date on which the actual shipment is alleged to have taken place, and at that time he testified (Tr. 39) that he was given the information about the shipment made, as alleged in the indictment, on February 10th. Obviously he could not have been given the information at that time and there is a mistake of some kind, either in the date of the indictment or in the date when he

made the visit to the plant; but whatever the mistake is, it is a mistake made by the Government and no motion was made at any time by Government counsel to have the indictment correspond with the proof. It is appreciated that an allegation "on or about" gives the Government certain variation, but also it is maintained that where the entire case rests upon the testimony of one witness, Mr. Baukin, who contradicted his testimony, as will be shown in later argument, his testimony must be viewed in the most favorable light as far as the defendant is concerned, and if that is done there is not sufficient evidence upon which to have submitted the case to the jury or even require the defendant to offer proof. Especially is this true when the wrong corporation was obviously charged with the offense.

Again the Court's attention is called to the fact that at this point, the conclusion of the Government's case, the cans examined were not introduced in evidence. A reading of the record of the direct testimony on the part of the Government of the United States must disclose to the reader that there was not sufficient evidence to allow this case to proceed any farther, because of the variance and because of the fact that the evidence disclosed that the only witness who examined any of the shipment did not introduce any of the matter examined into evidence, and that the actual cans

introduced into evidence were part of a code number which had been previously examined by a Government witness in 1950 according to his own testimony and found to be perfect shipment. At that state in the record the Court should have dismissed the indictment as against both defendants.

ARGUMENT ON POINT ONE

With reference to the first point relied upon, the motion to dismiss the indictment should have been sustained on grounds of variance between the allegation in the indictment and the proof. It is submitted that an examiner's report getting information on February 7th or 8th, 1955, that a shipment was made as alleged on February 10, 1955, is an impossible situation and that the evidence is in such complete variance that the action should have been dismissed.

In the statement of points to be relied upon in appeal, points 2 and 3 cover the matter of allowing witnesses to testify the first time on rebuttal concerning certain facts. This Court's specific attention is called to the fact that on page 43 of the transcript, the Court asked the witness the following question: "Have you given us the full conversation that was requested? Have you given the full conversation that was requested as best you can recall it? The answer of the witness was "Yes." Mr. Baukin was recalled on re-

buttal (Tr. 70). He was asked by Mr. Roberts, Assistant United States Attorney, whether or not on the very day that he testified to before, February 7th or February 8th, 1955, he had a conversation with Mr. Lelles about current production of cultured mushroom salt. This question was objected to (Tr. 71) as being improper rebuttal. Over objection he was allowed to testify (Tr. 72 & 73). He testified that in his direct testimony he did not relate all of the conversation he had with Mr. Lelles at that time. It will be remembered that the Court asked him (Tr. 42) whether or not that was the entire conversation, the conversation that he related on direct examination, and he answered "Yes." Now, on rebuttal he was allowed to testify to additional matters not included in his first statement on direct examination. It will be observed that in the transcript (p. 73) he states that the particular point that he had reference to in his previous testimony was reference to interstate shipment, that that was the entire conversation with reference to said subject matter. If this Court will look at the transcript, pages 42 and 43, it will be observed that the subject matter brought up there was not interstate shipment but preparation of mushroom salt. All that one has to do is to read the record and we find that it was error, highly prejudicial to the defendants, to allow the witness Baukin, on rebuttal to bring out new matter concern-

ing the manufacture by Mr. Lelles of some mushroom salt and especially is this error when, on direct examination by the Court, not by either counsel but by the Court, as to whether or not what he had stated on direct examination was all the information that he had and a complete answer to the question and he answered "Yes" that it was the complete conversation. And now, dealing with exactly the same subject matter on page 73 of the transcript, he details an entirely different conversation on rebuttal for the first time.

The motion to strike should have been granted. (Tr. 73). It will be noted (Tr. 74) that on cross-examination the witness said "The discussion I was referring to yesterday (Tr. 43) was one in regard to shipments." Obviously a reading of the transcript (Tr. 43) shows that it was not a conversation with regard to shipments but was one with regard to the manufacture of mushroom salt.

Now on rebuttal again for the first time witnesses Elliott (Tr. 78) over the objection of defense counsel, and witness Wallace (Tr. 84), over the objection of counsel, on rebuttal testified to the contents of these exhibits, establishing what should have been established as the Government's case in chief. After the government had rested its case, the defense had a right to believe that the evidence upon which conviction was

sought was the evidence introduced in case in chief, and for the Government to be allowed on rebuttal to bring out new testimony and new evidence with reference to the subject matter introduced in evidence in the first instance is improper rebuttal. It was likewise improper for the Government to have Mr. Wallace, a witness on rebuttal (Tr. 87) venture an opinion as to whether the samples purportedly coming from lots 102 and 103, which were obtained in 1955, were the same as the ones that were examined in 1950. That was a matter for the jury to determine and not for Mr. Wallace. Exception was taken to the Court's ruling allowing Mr. Wallace to testify that in his opinion these were different. The Court should have stricken the testimony.

The Court erred in allowing the matter to go to the jury. As to the question whether the Court should have allowed the matter of liability of Cultured Mushroom Industries, Inc. and the defendants to go to the jury, this Court's attention is called to the transcript, page 94, wherein the Court itself says: "It seems to me while it may be true, there doesn't seem to be anything in the evidence to indicate that they caused (interrupted by counsel)", and then the Court said "Well I think it's pretty weak. However, I will reserve ruling on that defendant until later and denied as to the individual".

The jury found both Cultured Mushroom Industries, Inc. and A. T. Lelles guilty. It is respectfully submitted that by the Court's submission or allowing to be submitted to the jury the question of the liability of Cultured Mushroom Industries, Inc. and A. T. Lelles individually, then the jury finding both guilty they may have concluded as the evidence disclosed that Mr. Lelles was an officer of Cultured Mushroom Industries, Inc. and if they so concluded that he was an officer of the corporation and that the corporation was guilty of having shipped the merchandise and he as an officer having been guilty of directing it or causing it to be shipped, then when the Court later dismissed the Cultured Mushroom Industries, Inc. from liability and dismissed them from the action, finding the corporation not guilty, it should likewise follow that the defendant Lelles is not guilty because the jury had submitted to it the question of the liability of Mr. Lelles as an individual and the Government proved he was an officer of the very corporation that was later dismissed from this action. That will be shown by the cases hereinafter submitted. This matter was highly prejudicial to the defendant A. T. Lelles. If the Court had sustained the motion as he should have done, to the corporation, and merely submitted the matter as to A. T. Lelles, then we would have another question for this Court.

ARGUMENT ON THE LAW

It was the duty of the Government to prove the charge, by evidence that satisfies beyond a reasonable doubt, that the defendants were guilty of the charge.

Lilienthals Tobacco Co. vs. U. S., 97 U. S. 237.
Potter vs. U. S., 155 U. S. 438
Davis vs. U. S., 160 U. S. 469

Many other cases to the same effect are cite in the case of *George A. Breon & Co., Inc. vs. U. S.* (CCA, 8th Circ.) 74 Fed (2d) 4, where the court reversed the District Court.

If the shipment was made by the Washington Mushroom Industries, and that is what the trial Court found by dismissing the corporate defendant, Cultured Mushroom Industries, Inc., there was not any proof that the defendant Lelles, acting as an officer of Washington Mushroom Industries or individually caused, authorized or directed the shipment. The shipment was made, as the evidence discloses, by Washington Mushroom Industries, Inc. The Government sought to prove that it was made by Cultured Mushroom Industries, Inc. While it was true Lelles was President of both companies, it is also true that if the Government's evidence was to be believed, and the jury so did, then the verdict is inconsistent.

The acts complained of were committed, as alleged

by the Government and proven by the Government to the jury's satisfaction, by agents of the Cultured Mushroom Industries, Inc.

This Court's special attention is called to the wording of the indictment (Tr. 3). Mr. Lelles is charged as "an individual at the time President of said corporation". This same language is repeated in both counts. The words "at the time President of the corporation" is descriptive of the individual charged. It should follow that if the corporation of which this individual is President did not make the shipment, and the Court so found by dismissing the action, then its President is not guilty.

To find the defendant, Arthur T. Lelles, guilty because he was President of another company which did in fact make the shipment is charging him with another offense not pleaded in the indictment. The Government argued that he was the President and, therefore, responsible, but their argument should fail when the Court decides that the corporation should be dismissed.

Since the Court's decision did not come until after the jury found both defendants guilty, we can but conclude that the jury decided that the corporation was guilty and that its President was guilty as well because he was the President and as such was responsible for

its acts. If the acts are not to be considered, and that is what the trial Court's dismissal amounts to, then the acts of its President should not be considered. For the Court to allow this verdict to stand as to the President and not the corporation would be a miscarriage of justice.

ARGUMENT ON POINTS 2 AND 3

The writer is aware of the rule 26 (Sec. 2185) that provides that the recalling of witnesses is ordinarily within the discretion of the trial Judge.

U. S. vs. Klass, 166 Fed. (2d) 373

It is our position that to allow a witness to open a new field of inquiry and to change his testimony after having testified in the Government's case in chief was an abuse of discretion. A reading of the rebuttal testimony reveals that the witness went into a new field of discussion: the manufacture by Lelles of mushroom salt. His conversation was most extensive on rebuttal and this Court is reminded that he is the same man that answered the trial Judge's question to the effect that he had on direct examination stated the entire conversation. Apparently there was an inspection of the plant and the conversation referred to what might very well be called another crime committed by the defendant.

CONCLUSION

It was error to allow the witness Wallace (Tr. 85) to testify on rebuttal re the contents of plaintiffs' exhibit 1; objections duly taken (Tr. 85), and it was error (Tr. 87), duly excepted to (Tr. 87), to allow the witness Wallace to testify that the salt shipped in 1955 was not the same that he examined in 1950 and approved. By allowing this testimony to stand and denying the defendant's motion to strike, duly made, the Court allowed the witness to speculate and venture an opinion on the very question that was exclusively in the province of the jury. He might just as well have expressed an opinion as to the defendant's guilt.

In view of the insufficiency of the evidence, the alleged error on rebuttal, all of which was duly excepted to, and the inconsistency of the verdict, it is respectfully submitted that the case should be reversed.

Respectfully submitted,

JEFFREY HEIMAN

Attorney for Appellant.